No. 13934

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DON MAURICE RANDALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

HONORABLE GEORGE W. FOLTA, *District Judge.*

HENDERSON, CARNAHAN, THOMPSON & GORDON,
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The Government's brief states (page 1) that the recital of the evidence in our opening brief was substantially accurate. From there, however, the brief so distorts and mis-states the evidence that we feel it encumbent upon us to reply. We do this lest the Court, from a reading of the Government's brief may get the impression that the evidence therein related is in accordance with the record.

Assignment of Error No. 2:

This assignment raises the question of admission of testimony of certain witnesses, that they *thought* the gun was loaded. It is discussed by the appellee on pages 4, 5 and 6 of its brief.

On page 6 of its brief the Government states "the question asked of the witnesses Herrick, Thompson and Abernathy, was simply, 'was the gun loaded?' " The record shows to the contrary, that the questions asked by the District Attorney of each of these witnesses was "*do you think the gun was loaded*" (Tr. 31, as to Thompson; 34 as to Herrick; 40 as to Abernathy).

The Government also states on page 6, "the question of whether the gun was loaded is a fact about which the witnesses could testify *if they had knowledge.*" (Emphasis ours). On cross examination each of these witnesses testified that they could not tell if the gun was loaded. In other words, they had no knowledge of the fact, as to whether the gun was loaded. (Tr. 32 as to Thompson; 35 as to Herrick; 40 as to Abernathy). It is obvious that at the trial the District Attorney realized that the witnesses had no actual knowledge of this fact. He therefore deliberately asked them not what they knew but what they *thought.*

As we anticipated, the Government relies heavily upon the fact that no objection was taken to this particular testimony of these witnesses. In that connection and on page 5 of appellee's brief, they criticize our exerpt from the case of *Brown vs. U. S.*, 152 Fed. 2d. 138 (CADC), stating that that language was not necessary to the opinion of the Court. However, we direct the Court's attention to the concurring opinion of Judge Stephens of this court, sitting by special assignment in the District of Columbia, appearing on page 140 of the Report. Judge Stephens expresses the view that the reversal in the *Brown* case should better have been founded upon the testimony of the police officers, to which there was no objection at the trial, than upon the testimony of another witness to which objection was taken.

Assignment of Error No. 3:

This assignment has to do with the testimony of Dr. O'Malley. The Government discusses this point in about one page (Pages 6 and 7). They have crowded into that brief space a most amazing set of mental gyrations.

The Government's brief says, "Dr. O'Malley was not testifying as a ballistics expert. He testified that the wound was caused by a pistol of 25 caliber." If the caliber—the size—of a bullet is not within the realm of

the science of ballistics, we should like to be advised into what field of training it belongs.

The Government argues that this testimony re caliber is not in the field of ballistics, but in the field of training of a doctor. This, they argue, despite the several cases cited in our opening brief which hold clearly that a doctor has no business expressing an opinion as to ballistics unless he shows some special training in that field in addition to and independent of his medical training.

The Government's brief says "a doctor could testify that the wound, from his experience, was caused by a gunshot." Granted. If the purpose of this testimony was to show merely that the wound was a gunshot wound, then it obviously was wholly irrelevant to the issues before the court. In this event the objection made by the defendant (Tr. 46) was well taken and should have been sustained. That this was not the purpose of the testimony is clearly shown by the record immediately following the defendant's objection, (Tr. 47) as follows:

> "The Court: For the purpose of showing the caliber or approximate caliber of the bullet which caused the wound, the objection is overruled.
>
> Mr. Buckalew: That's the purpose of it, your Honor.
>
> The Court: Go ahead."

Despite the United States' attorney's assertion, at the trial, that the purpose of this testimony was to show caliber, the Government's attorneys now state (Appellee's Brief 7): "Subsequent testimony that it was a 25 caliber gun which caused the wound was volunteered * * *".

On this point Government counsel quotes from Wigmore to the following effect, "But the only true criterion is: On this subject can a jury draw from this person appreciable help? * * *" We think this excerpt points up the seriousness of the error in admitting this testimony from the doctor. The Court permitted a doctor to express an opinion upon a subject upon which he had no prior knowledge or qualification. His opinion was at least no better than that of any of the jurors. If the jurors were typical Alaskans, we anticipate the doctor's opinion was of far less value than their own.

Assignments of Error Nos. 4 and 5:

Our Assignment of Error No. 4 is to the effect that there was not sufficient evidence to submit to the jury on the question of whether the gun was loaded. Our Assignment of Error No. 5 raises the question of the sufficiency of the instructions given with respect to this same issue.

We shall discuss the appellee's brief on these two points together. There seems to run through the Government's discussion of these two points, a strange new concept of law, i.e., that when the Government runs into difficulty proving an essential element of a charge, that the burden then shifts to the defendant to disprove that element.

To illustrate, we quote the following excerpts from appellee's brief:

> "How could there be direct evidence that the gun was loaded if the government failed to get the gun immediately after the assault?" (page 9)

> "We contend that a gun is inherently dangerous and that the burden of showing that the gun was unloaded should rest on the defendant because those facts are within his peculiar knowledge, especially where the gun is not recovered, which is the case here." (page 10).

> "Defendant's requested Instruction No. 1 conveys the impression that the government must prove that the gun was in fact loaded, which is not the law." (page 10).

Unless we grossly misinterpret this language, it is apparent that the Government is now urging that on a charge for "an assault with a dangerous weapon" the Government is not obliged to prove that the weapon was in fact dangerous. What are the essential elements of this crime? Well, the trial Court in its instruction No. 2 (Tr. 13) says they are (1) an assault, and (2)

with a dangerous weapon. The Government now urges that it does not have to prove this second element. In other words, it says that it makes a case when it has proved an assault. Of course, this reasoning gets us to the ridiculous point where there is no distinction between a simple assault and one with a dangerous or deadly weapon.

The *Price case*, 156 Fed. 950, cited in our brief at page 21, holds clearly that an unloaded gun cannot be the vehicle for an assault with a dangerous weapon, unless of course it is used as a club or bludgeon.

The case of *Jackson vs. U. S.*, 102 Fed. 473, cited by the appellee, does not hold otherwise. Its only effect is that the jury could determine whether the gun was in fact loaded from all the surrounding facts and circumstances in that particular case. In fact we do not understand that the appellee is now contending that the use of a dangerous weapon is not one of the elements of the crime here charged. What they are asserting is that the Government need not prove that element, that the burden is upon the defendant to disprove it. We have thought that under our system of criminal jurisprudence, it was elemental that the burden was upon the prosecution to prove beyond a reasonable doubt by some type of evidence, direct, circumstantial or otherwise, each of the material allegations of the

charge. We have heard of no recent change in this fundamental rule, until seeing it asserted in the Government's brief.

In our opening brief we urged, under point 4, that the evidence as to whether the gun was loaded, was insufficient to take to the jury the charge of assault with a dangerous weapon, and under point 5 that the Court's instructions on the distinction between the two crimes being dependent upon whether the gun was loaded or not, were deficient. May we suggest now that the Government's present position, that it need not prove the gun was loaded, is a tacit admission that the position we there take is sound.

Under our Assignment of Error No. 5 we urged that the trial Court erred in failing to instruct on circumstantial evidence, even though the defendant made no request for such instruction. We cited cases to the effect that the Court is required to instruct on all essential principles of law, even though no request for such instruction is made.

On page 11 of the appellee's brief it refers to *Todorow vs. U. S.*, 173 Fed. 2nd 439, a case from this court. We have examined the *Todorow* case and it appears to us that the only pertinent language therein is the following from page 445:

"They cite cases, which have applied the general rule that in a criminal case, the Court must instruct the jury on all applicable law involved, whether or not he is requested to do so. The rule does not go beyond the requirement that the Court instruct on the principles of law which the jury should have in order to decide the factual issues presented."

The only important factual issue in our case, was whether the gun was loaded. The only evidence on that point, if any, was circumstantial. To paraphrase the language of the *Todorow* case, should not the Court have instructed on the principles of law with respect to the evaluation of circumstantial evidence, so that the jury could decide the factual issue presented, to-wit, was the gun loaded?

We again urge that the series of errors committed in the trial of this cause warrant a reversal.

Respectfully submitted,

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